115

(4)

Supreme Court, U.S.
FILED
DEC 19 2008
OFFICE OF THE CLERK

No. 08-539

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

Petitioners,

v.

ROBERT SIMON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

STEPHEN A. FENNELL
Counsel of Record
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

MICHAEL RIPS
ANTHONY A. ONORATO
JUSTIN B. PERRI
STEPTOE & JOHNSON LLP
750 Seventh Avenue
New York, NY 10019
(212) 506-3900

Attorneys for Respondents

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

ARGUMENT 1

I. THIS COURT IS BOUND BY CONGRESS' ENACTED STATEMENT OF INTENT AS TO § 1503 OF THE EWSAA 1

II. THE UNITED STATES' CONSTRUCTION OF § 1503 IS NOT SUPPORTED BY THE TEXT OF THE EWSAA 5

III. THE U.S. MISINTERPRETS THE RELEVANCE OF THE LIBYAN CLAIMS RESOLUTION ACT 8

IV. THE PRESIDENT IS NOT ENTITLED TO DEFERENCE IN THIS CIRCUMSTANCE 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Acree v. Republic of Iraq,
370 F.3d 41 (D.C. Cir. 2004) 8

Alaska v. United States,
545 U.S. 75 (2005) 6

Ali v. Fed. Bureau of Prisons,
128 S. Ct. 831 (2008) 5

City of New York v. Permanent Mission of India to the United Nations,
446 F.3d 365 (2d Cir. 2006).....10-11

Japan Whaling Ass'n v. Am. Cetacean Soc'y,
478 U.S. 221 (1986) 10

Nixon v. Missouri Municipal League,
541 U.S. 125 (2004) 6

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 4

Red Lion Broad. Co. v. FCC,
395 U.S. 367 (1969) 3

Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325 (E.D.N.Y.), *aff'd in part and dismissed in part*,
162 F.3d 748 (2d Cir. 1998)..... 8-9

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 11

Small v. United States, 544 U.S. 385 (2005) 6

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 2, 3, 4

Stockdale v. The Ins. Cos.,
87 U.S. (20 Wall.) 323 (1873) 2

United States v. Alvarez-Sanchez,
511 U.S. 350 (1994) 6

United States v. Morrow,
266 U.S. 531 (1925) 6

United States v. Palmer,
16 U.S. 610, 3 Wheat. 610,
4 L. Ed. 471 (1818) 5

United States v. Sw. Cable Co.,
392 U.S. 157 (1968) 4

STATUTES

28 U.S.C. § 1605(a)(7) (2000).....2, 7, 8

28 U.S.C. § 1606 (2000) 7

Emergency Wartime Supplemental
Appropriations Act of 2003, Pub. L. No.
108-11, 117 Stat. 559 (2003) 2, 4, 5, 8

§ 1503, 117 Stat. 579 .....*passim*

Libyan Claims Resolution Act, Pub. L. No.
110-301, 122 Stat. 2999 (2008) 9

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 338 (2008) 1, 4

§ 1083(c)(4), 122 Stat. 343 ..... 1, 4, 8

LEGISLATIVE MATERIALS

Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service Report for Congress No. 97-589 (Aug. 31, 2008) 3

139 Cong. Rec. S4925 (1993) 7

142 Cong. Rec. H2141-42 (1996) 7

BOOK AND ARTICLES

Thomas M. Cooley, *Constitutional Limitations* at 50-51 (7th ed. 1903) 2

Reed Dickerson, *The Interpretation and Application of Statutes* at 180 (3d ed. 1975) 3

MISCELLANEOUS

Statement of Judge John G. Roberts, Jr. to the United States Senate Committee on the Judiciary (Aug. 1, 2005) 1

U.S. Department of State Fact Sheet,
Significant Events in U.S.-Libyan Relations
at
http://www.state.gov/r/pa/prs/ps/2008/sept/
109054.htm (last visited Dec. 18, 2008) 9

RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN *BEATY v. REPUBLIC OF IRAQ*

Pursuant to Sup. Ct. R. 15.8, Respondents submit the following response to the Brief for the United States as *Amicus Curiae* ("U.S. Br.") filed December 12, 2008, in the case of *Republic of Iraq v. Beaty*, No. 07-1090. Because the United States urges the Court to grant *certiorari* to consider Iraq's argument that the President has divested the courts of jurisdiction over cases against Iraq, squarely implicating the outcome of the petition for *certiorari* filed in this case, Respondents offer the following points in reply.[1] As the United States concedes, there is no split in authority at issue.[2] (U.S. Br. at n.1.)

ARGUMENT

I. THIS COURT IS BOUND BY CONGRESS' ENACTED STATEMENT OF INTENT AS TO § 1503 OF THE EWSAA.

Section 1083(c)(4) of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 338 (2008) ("NDAA"), declaring

---

[1] A decision in *Beaty* or *Simon* would necessarily involve consideration of *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004). Chief Justice Roberts has stated he "would also recuse [himself] from matters in which [he] participated while a judge on the court of appeals." Statement of Judge John G. Roberts, Jr. to the United States Senate Committee on the Judiciary at 62 (Aug. 1, 2005).

[2] For this reason the entirety of Iraq's argument regarding the NDAA (Br. for Pet'rs at 26-28; Reply Br. at 7-11) must be discounted.

Congress' intent with respect to § 1503 of the previously enacted Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 559 (2003) ("EWSAA"), precludes the courts from holding that they are without jurisdiction over cases pending under § 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA"). The Solicitor General's response to this is to repeat the saw from *South Dakota v. Yankton Sioux Tribe* that the actions of a subsequent Congress are given little weight in interpreting prior enactments. (U.S. Br. at 18–19.) From this it is to be assumed that the Solicitor General is not entirely familiar with the law in this area, a review of which will now be provided:

There is a long tradition in the United States and England of legislative enactments in which a legislature mandates the manner in which a prior statute is to be interpreted.[3] Such enactments (referred to as "declaratory legislation") are binding on the courts, and as such, occupy the latter end of a continuum of subsequent congressional actions which at one pole are given little or no weight (*e.g.*, statements by individual legislators occurring long after the relevant enactment) and at the other side

---

[3] *See* Thomas M. Cooley, *Constitutional Limitations* at 50–51 (7th ed. 1903); *Stockdale v. The Ins. Cos.*, 87 U.S. (20 Wall.) 323 (1873) ("Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.").

are binding on the courts.[4] Declaratory legislation is not simply an historic event which the courts, at their discretion, are permitted to use or dismiss as evidence of legislative intent but rather are authoritative mandates from the Congress, which the courts must follow.[5]

The Solicitor General's citation to *South Dakota v. Yankton Sioux Tribe* and other cases is misplaced because none of the cases involved an act of Congress which dictated a specific interpretation of an earlier statute. In *Yankton Sioux*, the issue was whether a nineteenth-century act of Congress had ceded certain tribal lands to the U.S. government. 522 U.S. 329, 354 (1998). In support of the contention that the lands were still part of the reservation, the Tribe and United States cited to statements made during congressional hearings held a century after enactment. The Supreme Court discounted those statements because they were contradicted by other

---

[4] Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service Report for Congress No. 97-589 at 45 (Aug. 31, 2008) ("If the views of a later Congress are expressed in a duly enacted statute, then the views embodied in that statute must be interpreted and applied."). *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380–81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.").

[5] Reed Dickerson, *The Interpretation and Application of Statutes* at 180 (3d ed. 1975) ("Whether or not [declaratory legislation] would be reliable as a declaration of previous intent, it is effective, not as an interpretation (which might be an unconstitutional invasion of the powers of a coordinate branch of government), but as a new act of legislation. Thus, even if it were wholly inadequate as an interpretation, it could stand as an amendment of the earlier statute.").

post-enactment statements and because they occurred so long after the original legislation. 522 U.S. at 354–55. The other cases cited by the Solicitor General are similarly irrelevant.[6]

Finally, the Petitioners and Solicitor General argue that even if they are wrong as to the effect of § 1083(c)(4), the President waived that section, along with the rest of § 1083. Such a waiver would, however, have no effect on the manner in which this Court should interpret the EWSAA. The reason for this is that the President's rationale for his waiver of § 1083 (*i.e.*, that it served the immediate interests of U.S. foreign policy in Iraq) has no bearing on the accuracy of Congress' declaration with respect to its earlier intention when it adopted the EWSAA. For that reason, Congress' declaration of its intent, even if waived for other reasons, remains controlling as to the question of the legislative intent behind the EWSAA.

Further to that point, the President could not have waived § 1083(c)(4). The President was authorized, after making certain findings, to waive provisions that he determined affect Iraq or any agency or instrumentality thereof. 122 Stat. at 343. However, § 1083(c)(4) is an enacted statement of intent as to an earlier statute, and not itself a provision which affects Iraq. In addition, the object of § 1083(c)(4) — § 1503 of the EWSAA — also cannot be considered a provision that affects Iraq because

---

[6] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (failed legislative proposals poor indicators of intent in 1974 ERISA); *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968) (failed legislative proposals poor indicators of intent in 1934 Communications Act).

that law has been inoperative since its sunset September 30, 2004. *See* 117 Stat. 579.

Finally and most importantly, the reader of this brief should note that the law of legislative declarations and their application to the facts of *Simon* and *Beaty* have received no consideration from the courts below — and yet it will consume the near entirety of this Court's attention should the Court grant the instant petition. This makes these cases particularly inappropriate for review by this Court.

II. THE UNITED STATES' CONSTRUCTION OF § 1503 IS NOT SUPPORTED BY THE TEXT OF THE EWSAA.

The United States' proposed interpretation of "any" to include any and every law, without limitation, is simply too facile. (U.S. Br. at 8–13). First, giving "any . . . provision of law that applies to countries that have supported terrorism" the unbounded interpretation the United States and Iraq have suggested would cause "any" to swallow the whole, thereby, for example, eliminating the EWSAA and the President's authority to waive the statute. This Court has not hesitated to limit the term "any" when there was reason to do so.[7]

---

[7] *See, e.g., Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 837 n.4 (2008) (citing cases in which Court for various reasons applied narrowing construction to "counteract the effect of expansive modifiers"); *id.* at 850 (Breyer, J., dissenting) ("[I]t is context, not a dictionary, that sets the boundaries of time, place, and circumstance within which words such as 'any' will apply." (citing *United States v. Palmer*, 16 U.S. 610, 3 Wheat. 610, 631, 4 L. Ed. 471 (1818) (Marshall, C. J.) ("[G]eneral words," such as

The surrounding context also compels a controlled reading of "any." Section 1503 is found in a proviso, which is most naturally read as limiting and relating to the predicate subject matter,[8] and the proviso is in an appropriations bill, which gives both context to the meaning of the provision as being related to spending and removing obstacles to spending, as well as giving pause in finding that Congress removed jurisdiction in such a legislative vehicle. The author of § 1503 (OMB) stated that § 1503 concerned embargoes, arm sales, exports, and foreign assistance,[9] and if Congress had wanted to eliminate an entire jurisdictional basis implicating 28 U.S.C. sections 1602–1611, it would not have been buried in the mouse hole that is the second proviso in the General Provisions section of Chapter 5

---

the word "'any'," must "be limited" in their application "to those objects to which the legislature intended to apply them"); *Small v. United States*, 544 U.S. 385, 388 (2005) ("The word 'any' considered alone cannot answer" the question "whether the statutory reference 'convicted in any court' includes a conviction entered in a foreign court"); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132 (2004) ("'[A]ny'" means "different things depending upon the setting"); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) ("[R]espondent errs in placing dispositive weight on the broad statutory reference to 'any' law enforcement officer or agency without considering the rest of the statute")).

[8] It is "customary to use a proviso to refer only to things covered by the preceding clause . . . ." *Alaska v. United States*, 545 U.S. 75, 106 (2005). "The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation." *United States v. Morrow*, 266 U.S. 531, 534 (1925). "Its grammatical and logical scope is confined to the subject matter of the principal clause." *Id.* at 534–35.

[9] *See* App. C to Resp'ts' Br. in Opp'n at 22a.

(BILATERAL ECONOMIC ASSISTANCE FUNDS APPROPRIATED TO THE PRESIDENT) of an appropriations bill.

The other arguments the United States offers are also unavailing. The U.S. tries to re-cast § 1605(a)(7) as a "sanction" to make it better fit its argument. (U.S. Br. at 2, 10.) Section 1605(a)(7) is better understood as a means of compensatory redress for personal injury torts, claims which could only be brought against foreign states under the auspices of the FSIA. The principal sponsors of the section both expressed the view that the purpose of the amendment was to give American victims a means of redress for personal injuries and did not describe it as a sanction.[10] This is consistent with the fact that punitive damages against the state sponsors of terrorism themselves were expressly prohibited. *See* 28 U.S.C. § 1606 (2000).

The U.S. also contends that the import of the sunset provision in § 1503 was misunderstood. It argues that the laws removed by the President prior to the sunset are permanently revoked and that only the authority to act expired. (U.S. Br. at 13.) Under § 1503, however, the President's authority to declare § 1605(a)(7) inapplicable with respect to Iraq lapsed after one year, absent further congressional authority. None was given. The majority in *Acree* noted that the sunset provision was inconsistent with

---

[10] *See* 139 Cong. Rec. S4925 (1993) (statement of Senator Specter) ("This legislation would . . . allow U.S. citizens . . . to protect their interests and seek compensation for the harm done to them."); 142 Cong. Rec. H2141-42 (1996) (statement of Congressman Fox) ("I introduced . . . the State-Sponsored Terrorism Responsibility Act to allow American victims to have a means of redress in the courts.").

the government's position that § 1503 of the EWSAA extended to § 1605(a)(7) of the FSIA. *Acree v. Republic of Iraq*, 370 F.3d 41, 56-57 (D.C. Cir. 2004). Consistent with the majority, Judge Roberts observed that it could not be assumed that the Congress would decline to exercise its prerogative to extend the sunset. *Id.* at 61–62. But Congress did not. Judge Roberts' statement reveals his belief that the effect of the waiver was coterminous with the congressional authorization.

Finally, Iraq since 2004 has been actively litigating in federal court.[11] Had the U.S. believed that jurisdiction did not exist because of § 1503, it would have informed Congress or filed a Statement of Interest telling the courts that they lacked jurisdiction. But it did not. Similarly, Congress would not permit the courts to adjudicate cases in jurisdictional limbo, especially with regard to Iraq, if it felt that *Acree* were wrongly decided. In fact, Congress did the opposite and enacted § 1083(c)(4), stating that § 1503 did not affect jurisdiction.

III. THE U.S. MISINTERPRETS THE RELEVANCE OF THE LIBYAN CLAIMS RESOLUTION ACT.

Libya, like Iraq, now friendly and once hostile, was a defendant in the several cases brought by the Pan Am 103 families. *See, e.g.*, *Rein v. Socialist*

---

[11] *Simon v. Republic of Iraq*, Civil No. 1:03-cv-00691 (D.D.C.); *Seyam v. Republic of Iraq*, Civil No. 1:03-cv-00888 (D.D.C.); *Vine v. Republic of Iraq*, Civil No. 1:01-cv-02674 (D.D.C.); *In re Terrorist Attacks on September 11, 2001*, 03-MD-1570 (S.D.N.Y.); *Beaty v. Republic of Iraq*, Civil No. 03-0215 (D.D.C.); *O'Neill v. Republic of Iraq*, 04-GBD-01076 (S.D.N.Y.).

People's Libyan Arab Jamahiriya, 995 F. Supp. 325 (E.D.N.Y.), *aff'd in part and dismissed in part*, 162 F.3d 748 (2d Cir. 1998). Facing liability in U.S. courts, Libya settled through an agreement struck by the United States and Britain. U.S. Department of State Fact Sheet, *Significant Events in U.S.-Libyan Relations* at http://www.state.gov/r/pa/prs/ps/2008/sept/109054.htm (last visited Dec. 18, 2008). Libya accepted responsibility for the actions of its officials in the Pan Am 103 bombing and established an escrow account paying over $1 billion in 2003 and again in 2004 to settle. *Id.* Yet, following normalization, Libya was still faced with liability for terrorist acts and so it agreed to the Libyan Claims Resolution Act to settle all outstanding claims. *See* Pub. L. No. 110-301, 122 Stat. 2999 (2008) (codified at 28 U.S.C. § 1605A note).

The United States cites the Libyan Claims Resolution Act as support for its argument that it is "unremarkable" that § 1503 would allegedly be given immediate effect. (U.S. Br. at 14.) This badly misses the point. The Act was no different from a settlement agreement in any other litigation — once it had been certified that Libya had paid the agreed monies into escrow, it would then be released from future liability.[12] This is typical of a settlement and does not explain why Iraq would be given immediate immunity *without* satisfying outstanding claims in return. In short, Iraq gains no support from Libya, which was removed from the terrorism list by owning

---

[12] *See* Libyan Claims Resolution Act §§ 3, 5(a)(1), 122 Stat. 2999-3000; U.S. Department of State Fact Sheet at http://www.state.gov/r/pa/prs/ps/2008/sept/109054.htm.

up to its liability for the past harms perpetrated by its government and settling those claims. Iraq wants the freedom from liability without satisfying the handful of debts it owes for torturing and kidnapping Americans. This is contrary to, not consistent with, the Libyan situation.

That successor governments remain liable for past governments' legal liabilities (be they commercial or, as in this case, personal injury claims) is an unassailable principle of international law. This principle held true with Libya, and is equally applicable to the United States and Iraq.

IV. THE PRESIDENT IS NOT ENTITLED TO DEFERENCE IN THIS CIRCUMSTANCE.

While the President is entitled to exercise inherent power over the conduct of foreign affairs free from judicial interference, that is not what the President has done here. Rather, the President has exercised a power that was specifically delegated to him by Congress within the scope of its own authority, and the President may not, in exercising that authority, exceed the powers that Congress has delegated to him.

Nor is the President entitled to deference in deciding the limits of that authority. Instead, it is the function of the courts, "applying no more than the traditional rules of statutory construction," to determine what authority was delegated to the President. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). This rule has been expressly applied by this and other courts to interpretation of the FSIA. *See City of New York v. Permanent Mission of India to the United Nations*,

446 F.3d 365, 377 n.17 (2d Cir. 2006) ("the executive branch's views on matters implicating foreign relations are entitled to consideration. However, 'interpretation of the FSIA's reach [is] a pure question of statutory interpretation' . . . and so the United States' views 'merit no special deference.'" (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)) (citations omitted).

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for *certiorari* in *Simon* and *Beaty*.

Respectfully submitted,

STEPHEN A. FENNELL
COUNSEL OF RECORD
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVE NW
WASHINGTON, DC 20036
202.429.3000 (T)
202.429.3902 (F)

MICHAEL RIPS
ANTHONY A. ONORATO
JUSTIN B. PERRI
STEPTOE & JOHNSON LLP
750 SEVENTH AVENUE
NEW YORK, NY 10019
212.506.3900 (T)
212.506.3950 (F)

Counsel for Respondents

December 19, 2008